A **PEMBINAAN EASTERN ALUMINIUM SDN BHD**

v.

NARITA SHIPPING & TRANSPORT SDN BHD

B COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
TENGKU MAIMUN JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: J-02-1817-2011]
C 2 APRIL 2014

CONTRACT: *Lease - Breach - Termination - Termination of agreement on ground of financial difficulty - Whether agreement could subsequently be terminated for nullity*

D ***CONTRACT:*** *Construction - Lease agreement - Whether lease void for non-registration - Whether parties chose to proceed with lease agreement notwithstanding non-registration of lease - Whether agreement to grant lease valid and enforceable - Whether plaintiff estopped from asserting that*
E *agreement for lease was void - Whether plaintiff entitled for refund to deposit paid*

LAND LAW: *Lease - Agreement for lease - Whether lease could be created without title to land - Whether issuance of issue document title contemplated - Whether lease legally effective under the National Land*
F *Code - Whether agreement to grant lease valid and enforceable - Whether parties chose to proceed with lease agreement notwithstanding non-registration of lease - Whether plaintiff estopped from asserting that agreement for lease was void - Whether plaintiff entitled for refund to deposit paid*

G

The plaintiff and the defendant entered into a lease agreement ('agreement') on 18 May 2007 for the lease of an office and a warehouse building ('demised premises') erected by the defendant on a piece of land. The duration of the lease was for five years
H commencing from the date of delivery of vacant possession. The agreed monthly rental was RM56,500. The demised premises was built by the defendant according to the plaintiff's request and specifications. Vacant possession was delivered on 16 October 2007 and was calculated to cease on 15 November 2012. The
I plaintiff paid the defendant a total of RM369,000 which comprised the first rental in the sum of RM56,500, five months deposit in the sum of RM282,500 and part of the rent for December 2007

in the sum of RM30,000. The document of title of the said land was issued on 1 June 2009. However, the plaintiff on 15 February 2007 terminated the lease agreement due to financial difficulties. The defendant thus requested for payment of the outstanding rental for the month of December 2007 and January 2008. The plaintiff failed to pay the outstanding rentals. To mitigate its losses, the defendant entered into a tenancy agreement with a third party for a term of three years at the rate of 50,000 a month. The plaintiff then filed an action at the High Court and sought to claim the refund of RM369,000 which was paid to the defendant on the basis that the lease agreement was void. On the contrary, the defendant contended that the lease agreement was valid and enforceable and that the plaintiff was estopped from alleging that the lease agreement was void. The defendant then counter claimed for the whole rental of the term of agreement less the sums paid by the plaintiff and the rental received by the defendant from the third party. After a full trial, the High Court Judge allowed the plaintiff's claim, and dismissed the defendant's counter claim. On appeal, the defendant submitted that an agreement to grant a lease could still be valid and binding notwithstanding that the lease itself was void for registration under the National Land Code ('the NLC'). It was the plaintiff's argument that the scheme of the NLC was such that there could not be a lease without title to the land. The bone of the plaintiff's contention was that the lease agreement was void for illegality pursuant to s. 24 of the Contracts Act 1950. The issues for determination by the Court of Appeal, *inter alia*, were (i) whether a lease could be created without title to land (ii) whether an agreement to grant a lease was valid; (iii) whether the plaintiff was estopped from asserting that the agreement to grant a lease was void; (iv) whether plaintiff was entitled for a refund of the deposit paid.

Held (allowing appeal and counterclaim; setting aside order of High Court)

Per Tengku Maimun JCA delivering the judgment of the court:

(1) Although a lease was void for non-registration under the NLC and that an agreement might be a nullity as a lease, an agreement could be a good and valid enforceable agreement to grant a lease. The lease agreement and the circumstances showed the clear intention of the plaintiff and the defendant to have an agreement to grant a lease. The construction of the demised premises was completed as per the request and

specifications of the plaintiff, and the plaintiff had taken possession of the demised premises on 16 October 2007. Even though the issue document of title to the said land had not been issued to the defendant but the issuance of the title was contemplated. Therefore, regardless of the outcome of the application for the registration of the lease, the plaintiff and the defendant agreed to continue with the agreement. The intention of the parties were crystal clear and the parties decided that they would not bind themselves to the registration of the lease but chose to carry on notwithstanding the non-registration of the lease under the NLC. The plaintiff was aware of the terms and conditions of the lease agreement and was not misled into executing the lease agreement with the defendant. (paras 15, 17 & 18)

(2) According to the contemporaneous document, the termination of the lease agreement by the plaintiff was on the sole ground that the plaintiff was not able to carry on due to its financial difficulty. The plaintiff failed to state that the lease agreement was terminated because it was void or illegal. Further, in notifying the defendant of its intention to terminate the agreement, the plaintiff did not ask for the refund of the monies paid to the defendant. Therefore, the contemporaneous document was evidence of the plaintiff's real reason not to proceed with the lease agreement. (para 20)

(3) The agreement was a valid and enforceable agreement for a lease as the issue document title was issued on 1 June 2009. Since the demised premises were constructed based on the plaintiff's request and specifications and the plaintiff had also taken vacant possession of the premise coupled with the fact that the termination was on the sole ground of the plaintiffs financial difficulty, the plaintiff was estopped from asserting that the agreement for the lease of the demised premises was void. As such, the plaintiff ought not to have the refund of RM369,000. (para 22)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif dan defendan memeterai satu perjanjian sewa ('perjanjian') pada 18 Mei 2007 di mana plaintif telah menyewakan sebuah pejabat dan bangunan gudang yang didirikan oleh defendan atas sebidang tanah kepada plaintif ('premis'). Tempoh sewa ialah lima tahun dan sewaan mula berkuatkuasa dari tarikh serahan milikan kosong. Sewa bulanan sebanyak RM56,500. Premis tersebut dibina

oleh defendan mengikut permintaan dan spesifikasi plaintif. Milikan kosong telah diserahkan kepada plaintiff pada 16 Oktober 2007 dan dikira berakhir pada 15 November 2012. Plaintiff telah membayar defendan sejumlah RM369,000 terdiri daripada sewa bulan pertama sebanyak RM56,500, deposit untuk lima bulan sebanyak RM282,500 dan sebahagian daripada sewa untuk Disember 2007 sebanyak RM30,000. Hakmilik tanah tersebut telah dikeluarkan pada 1 Jun 2009. Walau bagaimanapun, plaintif telah pada 15 Februari 2007 menamatkan perjanjian sewa tersebut atas alasan masalah kewangan. Oleh itu, defendan telah meminta bayaran sewa tertunggak bagi bulan Disember 2007 dan Januari 2008. Plaintif telah gagal membayar sewa tertunggak tersebut. Untuk mengurangkan kerugiannya, defendan telah menandatangani suatu perjanjian penyewaan dengan pihak ketiga untuk tempoh tiga tahun pada sewa 50,000 sebulan. Plaintif kemudiannya telah memfailkan tindakan di Mahkamah Tinggi untuk menuntut bayaran balik sebanyak RM369,000 yang telah dibayar kepada defendan atas alasan perjanjian terbatal. Sebaliknya, defendan menegaskan bahawa perjanjian tersebut adalah sah dan boleh dikuatkuasakan dan plaintif telah diestop daripada mendakwa perjanjian sewa tersebut terbatal. Defendan kemudiannya telah membuat tuntutan balas bagi keseluruhan sewa bagi tempoh perjanjian setelah menolak bayaran yang telah dibayar oleh plaintif dan sewa yang diterima oleh defendan dari pihak ketiga. Selepas perbicaraan yang penuh, Hakim Mahkamah Tinggi telah membenarkan tuntutan plaintif, dan menolak tuntutan balas defendan. Dalam rayuan, defendan menghujahkan bahawa perjanjian untuk memberikan sewaan adalah sah dan mengikat walaupun penyewaan tersebut adalah tidak sah untuk pendaftaran di bawah Kanun Tanah Negara 1965 (KTN). Adalah hujahan plaintif bahawa skim KTN tidak membenarkan kewujudan pajakan tanpa hak milik tanah. Asas hujahan plaintif adalah bahawa perjanjian pajakan tersebut adalah terbatal kerana menyalahi undang-undang di bawah s. 24 Akta Kontrak 1950. Isu-isu untuk ditentukan oleh Mahkamah Rayuan antara lain adalah (i) sama ada suatu pajakan boleh dibuat tanpa hakmilik tanah; (ii) sama ada perjanjian untuk sewaan adalah sah; (iii) sama ada plaintif telah diestop daripada menyatakan bahawa perjanjian untuk sewa tersebut terbatal; (iv) sama ada plaintiff layak menuntut bayaran balik deposit yang dibayar.

A B C D E F G H I

Diputuskan (membenarkan rayuan dan tuntutan balas; mengetepikan perintah Mahkamah Tinggi)
Oleh Tengku Maimun HMR menyampaikan penghakiman mahkamah:

(1) Walaupun suatu pajakan adalah terbatal kerana tidak didaftarkan di bawah KTN dan perjanjian tersebut berkemungkinan tidak sah, suatu perjanjian boleh menjadi sah dan berkuatkuasa untuk mengadakan suatu perjanjian pajakan. Perjanjian pajakan dan keadaan menunjukkan plaintif dan defendan mempunyai niat yang jelas untuk mengadakan suatu perjanjian pajakan. Pembinaan premis telah selesai berdasarkan permintaan dan spesifikasi plaintif dan plaintif telah mengambil milik premis tersebut pada 16 Oktober 2007. Walaupun hakmilik untuk tanah tersebut belum dikeluarkan kepada defendan, tetapi pengeluaran hakmilik tersebut telah dijangka. Oleh itu, tanpa mengira tentang keputusan hasil permohonan pendaftaran sewaan, plaintif dan defendan telah bersetuju untuk meneruskan perjanjian tersebut. Niat pihak-pihak adalah jelas dan pihak-pihak telah memutuskan bahawa mereka tidak akan mengikat diri mereka dengan pendaftaran sewaan tetapi memilih untuk meneruskan perjanjian tersebut walaupun pendaftaran sewaan gagal dibuat di bawah KTN. Plaintif menyedari terma dan syarat perjanjian sewa dan tidak dikelirukan dalam melaksanakan perjanjian sewa dengan defendan.

(2) Menurut dokumen semasa, alasan tunggal penamatan perjanjian sewa oleh plaintif adalah kerana plaintiff tidak mampu meneruskan perjanjian tersebut atas sebab kesukaran kewangan. Plaintif gagal untuk menyatakan bahawa perjanjian pajakan itu ditamatkan kerana ia terbatal atau menyalahi undang-undang. Selanjutnya, ketika plaintif memaklumkan kepada defendan mengenai niatnya untuk menamatkan perjanjian tersebut, plaintif gagal menuntut pembayaran balik wang yang telah dibayar kepada defendan. Oleh itu, dokumen semasa adalah bukti alasan sebenar plaintif tidak meneruskan perjanjian sewa tersebut.

(3) Perjanjian tersebut adalah sah dan boleh dikuatkuasakan sebagai suatu perjanjian sewa kerana hakmilik telah dikeluarkan pada 1 Jun 2009. Oleh kerana premis tersebut telah dibina mengikut permintaan dan spesifikasi plaintif dan plaintif juga telah mengambil pemilikan kosong premis tersebut, ditambah

pula alasan tunggal penamatan tersebut adalah kesukaran kewangan, plaintif telah diestop daripada menyatakan bahawa perjanjian pajakan premis tersebut terbatal. Oleh itu, plaintif tidak patut diberi bayaran balik sebanyak RM369,000.

Case(s) referred to:
Hotel Anika Sdn Bhd v. Majlis Daerah Kluang Utara [2006] 4 CLJ 981 HC ***(refd)***
Margaret Chua v. Ho Swee Kiew & Ors [1961] 1 LNS 61 HC ***(refd)***
Ong Heng Hwa Realty Sdn Bhd v. Teoh Chai Siok [1976] 1 LNS 87 HC ***(refd)***
Siew Soon Wah v. Yong Tong Hong [1973] 1 LNS 137 PC ***(refd)***
Wan Salimah Wan Jaffar v. Mahmood Omar; Anim Abdul Aziz (Intervener) [1998] 1 CLJ 480 HC ***(refd)***
Yong Tong Hong v. Siew Soon Wah & Ors [1971] 1 LNS 161 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24, 66
National Land Code, ss. 5, 40, 78(3), 221

For the appellant - Pang Kong Seng; M/s KS Pang & Co
For the respondent - Yoong How Kiat; M/s HK Yoong

[Editor's note: For the High Court judgment, please see Narita Shipping & Transport Sdn Bhd lwn. Pembinaan Eastern Aluminium Sdn Bhd [2010] 3 CLJ 600.]

Reported by Sandra Gabriel

JUDGMENT

Tengku Maimun JCA:

[1] This is the defendant's appeal against the decision of the High Court in allowing the plaintiff's claim and dismissing the defendant's counterclaim. For ease of reference, parties will be referred to as they were in the High Court.

[2] The plaintiff's claim against the defendant was for the refund of monies paid under a lease agreement dated 18 May 2007 entered into between the defendant as the lessor and the plaintiff as the lessee. The subject of the lease was an office and warehouse building to be erected by the defendant on a piece of land known as PLO 19 (PTD 87634), Jalan Persiaran Teknologi, Taman Teknologi, Johor Bahru (the demised premises).

[3] The preamble to the lease agreement states that the practical completion of the demised premises was expected to be on or before the expiry of a period of five months from the date of the agreement. Clause 1.1 of the lease agreement provides that the term of the lease was for a period of five years commencing from the date of delivery of vacant possession of the demised premises at a monthly rental of RM56,500.

[4] Clause 2.1 states that the issue document of title to the said land has yet to be issued by the appropriate authorities. Clause 2.2 states that after the issuance of the issue document of title to the land by the appropriate authorities and the registration of the defendant's name thereon, the defendant shall as soon as possible, at its own cost and expense submit application to the relevant authorities for the approval/consent for the registration of the lease on the issue document of title. Clause 2.3 provides *inter alia* that in the event the approval is subject to terms and conditions which are unacceptable to the defendant, then it shall be deemed that the approval has not been given and the provisions in cl. 2.5 shall become applicable. Under cl. 2.5, parties agree that in the event the defendant is unable to obtain the approval with terms and conditions acceptable to the defendant, the defendant shall continue to lease to the plaintiff and the plaintiff shall continue to take the lease in accordance with the agreement until its expiry, save and except for the registration of the lease on the issue document of title.

[5] The demised premises was built by the defendant at the plaintiff's request and in accordance to the specification of the plaintiff. The certificate of practical completion of the demised premises was issued on 15 October 2007 and vacant possession was delivered to the plaintiff *vide* the defendant's letter dated 16 October 2007. The plaintiff acknowledged receipt of the defendant's letter by affixing its company's chop. By virtue of the agreement, the term of lease would have commenced from 16 October 2007 to 15 November 2012. The plaintiff had paid the defendant a total of RM369,000. The sum comprised of the first rental in the sum of RM56,500; five months' deposit in the sum of RM282,500 and part of the rent for December 2007 in the sum of RM30,000.

[6] The certificate of fitness for occupation of the demised premises was issued by the Majlis Perbandaran Kulai on 17 March 2008. On 1 June 2009 the document of title to the said land was issued.

[7] However, by a letter dated 15 December 2007, Tan Suan Chen of the plaintiff wrote to the defendant as follows:

> Re: Termination Of The Lease Agreement
>
> I, on behalf of Narita Shipping & Transport Sdn Bhd hereby to inform you that we would like to terminate the lease agreement (reference number: HSH/SEET/37006/07/cc) with effect on 1 January 2008 due to our financial problem.
>
> We hope that you can understand and sorry for any inconvenience.

[8] The defendant responded *vide* a letter dated 16 January 2008 requesting for payment of the outstanding rental for the month of December 2007 (RM26,500) and January 2008 (RM56,500). The plaintiff failed to pay. To mitigate its losses, the defendant entered into a tenancy agreement with GPAC Technology (S) Pte Ltd. The term of the tenancy was for three years from 1 August 2008 to 31 July 2011 at the rate of RM50,000 a month.

[9] On 22 February 2008, the plaintiff filed the writ and the statement of claim seeking for the refund of RM369,000 paid to the defendant. The basis for the claim is that the lease agreement is void. In its statement of defence, the defendant pleaded that the lease agreement is valid and enforceable and that the plaintiff is estopped from alleging that the lease agreement is void. The defendant counterclaimed for the rental for the whole term of the agreement less the sums paid by the plaintiff and the rental received by the defendant from GPAC Technology (S) Pte Ltd. After a full trial, the learned High Court Judge allowed the plaintiff's claim and dismissed the defendant's counterclaim, hence this appeal.

The Appeal

[10] Due to the delay in the delivery of the grounds of judgment, directions were given during case management that the appeal be heard without the grounds of judgment of the learned trial judge. We did so accordingly.

[11] Before us, the principal issue to be determined was on the validity of the lease agreement. It was the submission of learned counsel for the defendant that an agreement to grant or to create a lease is different from a lease and that an agreement to grant or

to create a lease is valid even though the lease is void for non-registration under the National Land Code 1965 (the NLC). Other issues raised were on estoppel and restitution under s. 66 of the Contracts Act 1950.

[12] For the plaintiff, it was submitted that the scheme of the NLC is such that there cannot be a lease without title to the land. Various provisions of the NLC, ie, s. 5 on the definition of "alienated land"; "proprietor" and "State land"; ss. 40; 78(3) and 221 were cited in support thereof. Section 40 stipulates that the property in all State land and the powers of disposal are vested solely in the State Authority. Section 78(3) provides that the alienation of State land shall take effect upon registration of the register document of title while s. 221 deals with the power of proprietors of any alienated land to grant lease of the whole or any part of the land.

[13] Flowing from the quoted provisions of the NLC, the bone of contention of the plaintiff was that the lease agreement is void for illegality by the definition of s. 24 of the Contracts Act 1950 in that the consideration of the lease agreement ie, the lease itself is not permissible within the legal framework of the NLC, rendering the consideration unlawful under the said section. It was further the submission of learned counsel for the plaintiff that by cls. 2.3 and 2.5, the lease agreement was devised to evade the NLC and that the defendant who has received the payment under the lease agreement which is void, is bound to refund the same to the plaintiff.

Our Findings

[14] Having considered the oral and written submissions of both parties and having perused the record of appeal, we agree with learned counsel for the defendant that the lease agreement is valid and enforceable. We unanimously allowed the appeal and we set aside the order of the High Court. Judgment was entered against the plaintiff on the counterclaim for the sum of RM471,000 with interest at 8% per annum from 1 January 2008 until full payment. We made a further order that the sum of RM369,000 together with interest paid by the defendant to the plaintiff be refunded to the defendant. Our reasons for so deciding are as follows.

[15] It has been established by a long line of authorities that although a lease is void for non-registration under the NLC and that an agreement might be a nullity as a lease, an agreement

could be a good and valid enforceable agreement to grant a lease. On the above proposition, we were referred to the following cases by learned counsel for the defendant: A

(i) *Margaret Chua v. Ho Swee Kiew & Ors* [1961] 1 LNS 61; [1961] 27 MLJ 173; B

(ii) *Yong Tong Hong v. Siew Soon Wah & Ors* [1971] 1 LNS 161; [1971] 2 MLJ 105;

(iii) *Siew Soon Wah v. Yong Tong Hong* [1973] 1 LNS 137; [1973] 1 MLJ 133; C

(iv) *Wan Salimah Wan Jaffar v. Mahmood Omar; Anim Abdul Aziz, (Intervener)* [1998] 1 CLJ 480; [1998] 5 MLJ 162;

(v) *Ong Heng Hwa Realty Sdn Bhd v. Teoh Chai Siok* [1976] 1 LNS 87; [1977] 1 MLJ 124; and D

(vi) *Hotel Anika Sdn Bhd v. Majlis Daerah Kluang Utara* [2006] 4 CLJ 981.

[16] In *Hotel Anika, supra*, the dispute also centres on a lease agreement where the defendant had no title to the subject land when the agreement was entered into. It was held in *Hotel Anika* that it would not seem the reasonable construction, indeed wholly improbable, that the defendant could have agreed to grant a lease of land to which it has no title. The reasonable construction would be that both parties had entered into the said agreement on the assumed basis that title to the said land would be alienated to the defendant. And until then, the plaintiff was permitted to use the said land. Hence what was agreed was a lease that would be effective if the defendant had obtained the relevant title. E F G

[17] In the instant appeal, it is our view that the lease agreement and the circumstances show the clear intention of the plaintiff and the defendant to have an agreement to grant a lease. It is not in dispute that the construction of the demised premises was completed as per the request and specification of the plaintiff. The plaintiff took vacant possession of the demised premises on 16 October 2007. The plaintiff knew from the outset that the issue document of title to the said land has not been issued to the defendant. But the issuance of the title to the defendant was contemplated, hence cl. 2.3 of the lease agreement on the defendant's obligation to obtain approval for the registration of the lease upon the issuance of the document of title. H I

[18] Further, regardless of the outcome of the application for the registration of the lease, the plaintiff and the defendant have agreed that they shall continue with the agreement to lease as borne out by cl. 2.5 of the agreement. The provisions of the NLC referred to by learned counsel for the plaintiff govern the registration and/or the validity of the lease but the intention of the parties was crystal clear. They have decided that they shall not bind themselves to the registration of the lease but choose instead to carry on notwithstanding the non-registration of the lease under the NLC. The plaintiff was well aware of the terms and conditions of the lease agreement. Indeed it was not the case of the plaintiff that it was being misled into executing the lease agreement with the defendant.

[19] We share the view of Abdul Malik Ishak J (as His Lordship then was) in the case of *Wan Salimah Wan Jaffar, supra*, as follows:

> ... it is correct to say that the written agreement (P1) though void at law as a lease because of non-registration as required under s. 221(4) of the NLC, yet it is good as an agreement enforceable in equity. The parties intended that there should be a lease and equity must be invoked to carry that intention into effect effectively. ... It is germane to mention that there is s. 206(3) of the NLC which enacts that nothing in sub-s. (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein. ... The contractual obligation of the parties under the written agreement (P1) must be given effect.

[20] We wish to emphasise that from the contemporaneous document, the termination of the lease agreement by the plaintiff was on the sole ground that the plaintiff was not able to carry on due to its financial difficulty. This was confirmed by the oral evidence of the plaintiff's witness, Tan Suen Chen in his examination-in-chief that when the plaintiff found it too heavy a burden to pay for the rent, by a letter dated 15 December 2005, he wrote to the defendant to inform the defendant of the plaintiff's intention to terminate the agreement with effect from 1 January 2008. Tan Suen Chen did not state that the lease agreement was terminated because it was void or illegal. Further, in notifying the defendant of its intention to terminate the agreement *vide* its letter dated 15 December 2007, the plaintiff did not ask for the refund of the monies paid to the defendant. In our view, the contemporaneous document is evidence of the plaintiff's real reason not to proceed with the lease agreement.

[21] Learned counsel for the plaintiff had submitted that in making the payments to the defendant and in informing the defendant of its desire to terminate on the ground of its financial difficulty, the plaintiff had been acting under the wrong understanding that the lease agreement was valid. Put another way, the plaintiff was ignorant of the law. We noted however that this material fact was not pleaded by the plaintiff.

[22] To conclude, we find that the agreement is a valid and enforceable agreement for a lease. And unlike the case of *Hotel Anika*, *supra*, where the document of title was not issued and the court held that there was frustration of the agreement, in the instant case, the issue document of title was in fact issued on 1 June 2009. As the demised premises was constructed based on the plaintiff's request and specifications and the plaintiff had taken vacant possession of the same, coupled with the fact that the termination was on the sole ground of the plaintiff's financial difficulty, we agree with learned counsel for the defendant that the plaintiff is estopped from asserting that the agreement for the lease of the demised premises is void. As such, the plaintiff ought not to have the refund of RM369,000 and that the defendant should be compensated for the loss under the lease agreement. In view of our ruling that the lease agreement is valid, we do not see the need to deal with the issue of restitution under s. 66 of the Contracts Act.

[23] In light of all the above, the defendant's appeal was allowed with costs of RM30,000 here and below, on terms as stated in the earlier part of this judgment. Deposit refunded.